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March 11, 2010

Joyce Brannen (Kennebunk)

v.

Community Partners, Inc. (Biddeford)

**I. COMPLAINANT'S CHARGE:**

Complainant, Joyce Brannen, alleged that Respondent, Community Partners, Inc. terminated her instead of allowing her to take a three week leave of absence she needed due to her mental disabilities.

**II. RESPONDENT'S ANSWER:**

Respondent, Community Partners, Inc. said that Ms. Brannen was not entitled to family medical leave and that she rejected offers of re-employment when she was ready to return to work.

**III. JURISDICTIONAL DATA:**

- 1) Date of alleged discrimination: November 21, 2008.
- 2) Date complaint filed with the Maine Human Rights Commission: Intake form received May 19, 2009; notarized charge filed June 4, 2009.
- 3) Respondent employs 350 employees and is subject to the Maine Human Rights Act, the Americans with Disabilities Act, as well as state and federal employment regulations.
- 4) Respondent is represented by Robert C. Brooks, Esq. and Anne Birgel Cunningham, Esq.
- 5) Investigative methods used: A thorough review of the written materials provided by the parties, fact finding conference.

#### **IV. DEVELOPMENT OF FACTS:**

1) The parties and issues in this case are as follows:

- a) The Complainant, Joyce Brannen, was employed by Respondent from March 18, 2008 until November 21, 2008. Ms. Brannen has had generalized anxiety and depression "all her life." She was hospitalized in 1999 for symptoms of depression and was "on disability" for a year after that, before she was able to return to work.
- b) The Respondent, Community Partners, Inc. (CPI), provides community based supports to Maine residents with developmental and multiple disabilities.
- c) HR is the HR Director for CPI. PM is a Program Manager for CPI.
- d) Complainant alleges that Respondent failed to provide her with the reasonable accommodation of a brief medical leave of absence, and terminated her employment on November 21, 2008.
- e) Respondent denied knowing that Complainant had a disability and needed a reasonable accommodation and said that Complainant was terminated because she did not qualify for family medical leave.

2) The parties provided the following with regard to Complainant's employment with Respondent:

- a) Ms. Brannen was hired as a Skilled Level I Direct Support Professional at an hourly rate of \$10+ per hour. She was scheduled to work at a program in Kennebunk (Beachwood) for 37-38 hours per week. On October 5, 2008, she asked to be taken off the Sunday schedule and her regularly scheduled hours dropped from 38 to 33.5 hours per week. On October 19, 2008, Ms. Brannen asked for more hours and they were increased from 33.5 to 37.5 per week. The extra hours involved work at a lower hourly rate (\$9+ per hour) in a non-skilled program in Biddeford.
- b) Beachwood (in Kennebunk) had two floors. The downstairs level, where Ms. Brannen worked, had four residents. It was staffed by about nine Direct Support Professionals (DSPs).
- c) On November 1<sup>st</sup> or 2<sup>nd</sup>, 2008, one resident moved from the downstairs level of Beachwood, which led to another reduction in Ms. Brannen's hours from about 37.5 to about 19 hours per week. Ms. Brannen stated that a few DSPs did not suffer a reduction in hours; she was told that hours were cut based on seniority, but she had worked at Beachwood longer than others whose hours were not cut as much as hers.
- d) According to PM, hours were cut based on company-wide seniority. Ms. Brannen and another DSP had the least company-wide seniority; therefore, their hours were cut the most.

- e) Ms. Brannen made up the hours by shadowing at other homes, so that she would not drop below 35 hours per week and lose her health benefits.
- 3) Complainant provided the following with regard to her need for a brief medical leave of absence in November 2008:
- a) Her son joined the military and went to boot camp, and she was having a hard time coping with this. She was also feeling stressed by the reduction in her hours and her fear of losing her health benefits. She was also having difficulty with a co-worker who, Complainant felt, was attacking her at a staff meeting. In addition, her doctor changed her prescriptions so that she qualified for lower cost medications, and it takes up to six weeks to adjust to medication changes. Adjusting to new medications was the biggest thing she was dealing with.
  - b) She worked up through Saturday, November 15, 2008. On Monday, November 17, 2008, she saw her doctor, and her doctor took her out of work so that she could adjust to new medications. (Ms. Brannen states that she was also recovering from back strain.) She saw her doctor again on Friday, November 21, 2008 and gave her some short term disability forms she obtained from CPI. Ms. Brannen and her doctor completed the forms, and her doctor faxed them to CPI.
  - c) The forms (see attached) read, in part:

**Group Short-Term Disability Statement of Employee**

13. Have you ever had the same or similar condition in the past? *Yes, past 20 years.*  
14a. please describe your sickness or how your injury occurred. *I have dealt w/anxiety/depression all my life. W/in the past month my doctor chgd my meds to generic or comparable to save \$ on co-pays not effective yet. Worried about my son in boot camp. Stress at work.*

**Attending Physician's Statement**

6. Diagnosis (including complications) *Generalized anxiety/depression*  
20. Has patient been hospital confined? *Yes – 1999 – SMMC.*  
22. Prognosis and rehabilitation: *Good prognosis for rehab.*  
a. When do you think your patient will be able to return to work?  
*PRESENT occupation: Approx 3 wks. ... Time needed for med adjustment & counsel.*

- d) After the forms were submitted, she received a call from HR saying they could not hold her position at Beachwood but that she could seek employment at another facility when she was able to return to work. HR told her that she could not return to Beachwood.
- 4) Respondent provided the following with regard to Complainant's request:
- a) (PM) On November 21, 2008, she received a doctor's note taking Ms. Brannen out of work for three weeks. She believes it was a doctor's note and does not remember

receiving the short term disability (STD) form. (However, the only medical note that Community Partners has is the actual STD form.) She called HR to discuss how to handle staffing issues at Beachwood. She read or communicated all of the information contained in the note to HR. She faxed the note/form to the Human Resources department.

- b) (HR) PM told her that Ms. Brannen's doctor had faxed over a note taking her out of work for three weeks. Ms. Brannen did not qualify for family medical leave, and she did not have any accrued sick leave, so she told PM to go ahead and terminate Ms. Brannen's employment. She gave PM permission to post and fill the shifts left open by Ms. Brannen.
  - c) (HR) She did not see the STD forms until well after Ms. Brannen was terminated. She made the decision to terminate Ms. Brannen's employment without any evidence that her need for leave was disability-related.
  - d) (HR) She called Ms. Brannen to let her know that she was terminated because she did not qualify for family medical leave and did not have any accrued sick leave. She told Ms. Brannen that her status was a voluntary quit, that she was in good standing with CPI, and eligible to return when she was released by her doctor. She told Ms. Brannen to call her or Mr. Recruiter and they would see if there was another position available.
  - e) (HR) Returning to Beachwood was not an option because they had to fill Ms. Brannen's hours when she went out of work.
  - f) (HR) It would not have been an undue burden to keep Ms. Brannen on employment status for three weeks, instead of terminating her.
  - g) If she had not been terminated, Ms. Brannen could have returned to the Beachwood facility but only for the 19 hours she was working at the time she had to stop working.
- 5) Respondent states that it made a job offer to Ms. Brannen when her employment was terminated. The offer was not for a specific job, number of hours, pay rate, or location.
  - 6) Respondent states that it has made two more job offers to Ms. Brannen after she filed for unemployment and after she filed this complaint with the Maine Human Rights Commission.
  - 7) Ms. Brannen states that she has not accepted Respondent's job offers because she should not have been terminated to begin with, and the offers were not fair.

## **V. ANALYSIS:**

- 1) The Maine Human Rights Act requires the Commission to "conduct such preliminary investigation as it determines necessary to determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S.A. § 4612(1)(B). The Commission interprets this standard to mean that there is at least an even chance of Complainant prevailing in a civil action.

- 2) Pursuant to the Maine Human Rights Act, unlawful discrimination includes “[n]ot making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the covered entity.” 5 M.R.S.A. §§ 4553(2)(E), 4572(2).
- 3) Here, Complainant Joyce Brannen alleges that Respondent Community Partners, Inc. failed to provide her with the reasonable accommodation of a brief medical leave of absence, and terminated her employment on November 21, 2008. Respondent denied knowing that Complainant had a disability and needed a reasonable accommodation and said that Complainant was terminated because she did not qualify for family medical leave.
- 4) To establish her claim, it is not necessary for Complainant to prove intent to discriminate on the basis of disability. *See Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 264 (1st Cir. 1999). Rather, Complaint must show (1) that she is a “qualified individual with a disability” within the meaning of the MHRA; (2) that Respondent, despite knowing of Complainant’s physical or mental limitations, did not reasonably accommodate those limitations; and (3) that Respondent’s failure to do so affected the terms, conditions, or privileges of Complainant’s employment. *See id.*
- 5) The Maine Human Rights Act defines “mental disability,” in relevant part, as a mental impairment that significantly impairs mental health, without regard to the ameliorative effects of medication. 5 M.R.S.A. § 4553-A(1)(A)(2), (2)(A). “Significantly impairs mental health” means having an actual or expected duration of more than 6 months and impairing health to a significant extent as compared to what is ordinarily experienced in the general population. 5 M.R.S.A. § 4553-A(2)(B);
- 6) The term “qualified individual with a disability” means “an individual with a physical or mental disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires.” 5 M.R.S.A. § 4553(8-D). Examples of “reasonable accommodations” include, but are not limited to, making facilities accessible, “[j]ob restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, [and] the provision of qualified readers or interpreters. . . .” 5 M.R.S.A. § 4553(9-A).
- 7) In proving that an accommodation is “reasonable,” Complainant must show “not only that the proposed accommodation would enable her to perform the essential functions of her job, but also that, at least on the face of things, it is feasible for the employer under the circumstances.” *Reed v. Lepage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001). It is Respondent’s burden to show that no reasonable accommodation exists or that the proposed accommodation would cause an “undue hardship.” *See Plourde v. Scott Paper Co.*, 552 A.2d 1257, 1261 (Me. 1989); Me. Hum. Rights Comm’n Reg. 3.08(D)(1) (July 17, 1999). The term “undue hardship” means “an action requiring undue financial or administrative hardship.” 5 M.R.S.A. § 4553(9-B).

- 8) Generally, Respondent is only required to provide a reasonable accommodation if Complainant requests one. *See Reed v. Lepage Bakeries, Inc.*, 244 F.3d at 261.
- 9) Here, Ms. Brannen has met her burden of proof, based on the following:
  - a) Ms. Brannen has two mental impairments, anxiety and depression. Her depression required at least one hospitalization followed by a long period of inability to work. Both impairments must be controlled by medication and have lasted for more than ten years.
  - b) Ms. Brannen is a "qualified individual with a disability" in that she is able to perform the essential functions of the Direct Support Professional job, with the reasonable accommodation of a brief medical leave of absence.
  - c) The evidence shows that Respondent knew of Ms. Brannen's mental impairments. On November 21, 2007, Ms. Brannen's doctor faxed short term disability (STD) forms to Ms. Brannen's supervisor, PM, which PM forwarded to the Human Resources Department. These forms indicate that Ms. Brannen has had anxiety and depression for the past 20 years, that she was hospitalized for these conditions in 1999, and that she is treated with medications.<sup>1</sup>
  - d) Ms. Brannen asked for the reasonable accommodation of a three week leave of absence from her position, to enable her to adjust to a change in her medications. This request was made on her behalf by her doctor, who faxed the STD forms to PM. At least on the face of things, this request was feasible for Respondent under the circumstances.
  - e) PM read the entire note/form to HR and together they denied Ms. Brannen's request. Instead of granting her a leave of absence, they terminated her employment.
  - f) It is not necessary to prove that Respondent intended to discriminate against Ms. Brannen. Respondent had enough information to know that Ms. Brannen's request was disability related, but believed that Ms. Brannen was not entitled to a leave of absence because she did not qualify for family medical leave and did not have any accrued sick leave.
  - g) The denial of a leave of absence affected the terms, conditions, and privileges of Ms. Brannen's employment in that she was terminated. Respondent argues that Ms. Brannen suffered no harm because she was offered re-employment as soon as her doctor cleared her to return to work. While Respondent's argument may be relevant to the issue of damages, it does not change the fact that Ms. Brannen was denied a reasonable accommodation, and her employment was terminated. Moreover, Ms. Brannen was told she would not be able to return to work at the Beachwood facility in Kennebunk, which

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<sup>1</sup> PM and HR did not recall seeing the STD forms. PM stated that she saw a doctor's note not the STD form, but the only documents the Respondent has dated November 21, 2008 are the STD forms and not a doctor's note.

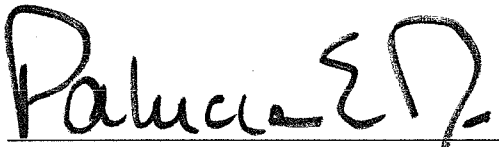
she would have been able to return to if she had been granted a leave of absence. In addition, Ms. Brannen would have lost her company-wide seniority, a privilege of employment that affects how many hours of work an employee is offered.

- 10) It is Respondent's burden to show that no reasonable accommodation exists or that the proposed accommodation would cause an "undue hardship." Here, it was reasonable for Respondent to provide Complainant with a brief medical leave of absence, and HR admitted that the leave of absence would not impose an undue hardship.

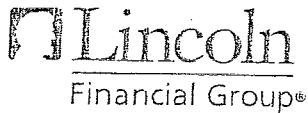
#### **VI. RECOMMENDATION:**

For the reasons stated above, it is recommended that the Maine Human Rights Commission issue the following finding:

- 1) There are **Reasonable Grounds** to believe that the Respondent, Community Partners, Inc., failed to provide Complainant, Joyce Brannen, with a reasonable accommodation; and
- 2) Conciliation should be attempted in accordance with 5 M.R.S.A. § 4612(3).

  
Patricia E. Ryan, Executive Director

  
Barbara Lelli, Chief Investigator



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# GROUP SHORT-TERM DISABILITY STATEMENT OF EMPLOYEE

(BENEFITS MAY BE DELAYED IF CLAIM FORM IS NOT FULLY COMPLETED)

Please sign this page and the authorization on page two of this form to avoid delays in processing  
(PLEASE see FRAUD NOTICES attached)

1. Full Name (last, first, middle initial) <b>Brannen Joyce E</b>		2. Social Security Number <b>---</b>		3. Phone Number (include area code) <b>(307) ---</b>	
4. Street Address & Mailing Address <b>P.O. Box</b>		5. City <b>Kennebunk</b>		6. State <b>ME</b>	
7. Zip Code <b>04043</b>		8. Date of Birth <b>11-6-59</b>		9. I have been unable to work because of my disability since <b>11/17/08</b>	
10. Gender <input type="checkbox"/> Male <input checked="" type="checkbox"/> Female		11. Hospital Confined <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No			
12. Marital Status <input type="checkbox"/> Single <input type="checkbox"/> Married <input checked="" type="checkbox"/> Widowed <input type="checkbox"/> Divorced		13. Have you ever had the same or similar condition in the past? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No If "Yes" provide dates: <b>past 20 yrs.</b>			
14. Is your disability due to a: <input type="checkbox"/> Sickness <input type="checkbox"/> Injury <input checked="" type="checkbox"/> Other		14a. Please describe your Sickness or how your Injury occurred: <b>I have dealt w/ anxiety/depress all my life. w/in the past month my doctor chgd my meds to generic or comparable to save \$ on copays. Not effective yet. worried about my son in boot camp. Stress at work.</b>		Height: <b>5'2"</b> Weight: <b>160</b>	
15. I returned to work part-time on: _____ I returned to work full-time on: _____					
16. Is your accident or illness due to your occupation? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No If "Yes" explain: _____					
Have you or do you intend to file a Workers Compensation Claim? <input type="checkbox"/> Yes <input type="checkbox"/> No					
17. Treated by: (on another piece of paper, provide names & addresses of all doctors who have treated you for this disability). Doctor: _____ Address: _____ <b>Kenn. Me 04046</b>					
18. Describe other income you are receiving, have applied for, or will be applying for:					
	Amount	Date Began	Date Will Terminate	Date Applied For	
Social Security (Disability Retirement)	\$ _____	_____	_____	_____	
Salary Continuance or State Disability Benefits	\$ _____	_____	_____	_____	
Workers' Compensation	\$ _____	_____	_____	_____	
Other income related to your disability	\$ _____	_____	_____	_____	
19. The above statements are true and complete to the best of my knowledge and belief. I have completed and attached the Authorization for Release of Information.					
The above Statements are true and complete to the best of my knowledge and belief. I have read and understand the attached Fraud Warning Statements.					
Signature of Employee <b>Joyce E. Brannen</b>		Date <b>11/21/08</b>			
20. Please provide us with your e-mail address: _____					



**ATTENDING PHYSICIAN'S STATEMENT**

1. Name of Patient <b>Joyce Brannen</b>		2. Social Security Number _____		3. Employer Name <b>Community Partners.</b>	
4. When did symptoms first appear or accident happen? <b>Approx 1 mo ago.</b>			5. Date you believe patient was unable to work? <b>pt last day of work 11/15/08</b>		
6. Diagnosis (including complications) <b>Generalized Anxiety/depression.</b>			7. Subjective symptoms <b>nausea, dizziness, ↓ motivation.</b>		
8. Objective findings (Including current x-rays, EKG's, laboratory data and any clinical findings) <b>N/A.</b>					
9. List of Restrictions & Limitations <b>lower stress employment recommended</b>					
10. Nature of treatment (Including surgery and medications prescribed, if any). <b>medicine management + counseling recommended</b>					
11. Names, specialty and addresses of other treating physicians <b>TBA counselor - pt To Schedule.</b>					
12. Has patient ever had same or similar condition? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No If "Yes" provide dates.					
13. Do you consider this condition to be due to your patient's employment? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No					
14. If pregnancy, Estimated date of delivery: Actual date of delivery: <b>N/A</b>			15. Date first treated <b>11/11/08</b>		16. Date of last visit/treatment <b>11/21/08</b>
17. Frequency <input checked="" type="checkbox"/> Weekly <input type="checkbox"/> Monthly <input type="checkbox"/> Other (specify)					
18. Has patient: <input type="checkbox"/> Recovered <input type="checkbox"/> Improved <input checked="" type="checkbox"/> Unchanged <input type="checkbox"/> Regressed			19. Is patient: <input checked="" type="checkbox"/> Ambulatory <input type="checkbox"/> House Confined <input type="checkbox"/> Bed Confined <input type="checkbox"/> Hospital Confined		
20. Has patient been hospital confined? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No Confined from: _____ to _____ If "Yes" give name of hospital. <b>1999 - SHMC.</b>					
21. Has surgery been scheduled or performed? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If "Yes" date of surgery: Type of surgery scheduled: <b>N/A</b>					
22. Prognosis and Rehabilitation: <b>good prognosis for rehab.</b>					
a. When do you think your patient will be able to return to work? PRESENT occupation? <b>Approx 3 wks.</b> ALL OTHER occupations?					
b. Can present job be modified to allow patient to handle with his/her impairment? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No					
c. When could trial employment commence? <b>3 wks</b> <input checked="" type="checkbox"/> Full-time <input type="checkbox"/> Part-time					
Please submit clinical documentation to support your decision. <b>Time needed for Med Abstract + Counsel.</b>					
Print Name (Attending Physician)		Specialty <b>F.P. PA-C</b>		Telephone (Include Area Code) <b>207 -</b>	
Street Address/City or Town/State or Providence/Zip Code <b>Kennebunk, ME 04043</b>					
The above Statements are true and complete to the best of my knowledge and belief. I have read and understand the attached Fraud Warning Statements.					
Signature (Attending Physician) No stamps please <b>[Signature]</b>			Date <b>11/21/08</b>		Fax Number (Include Area Code) <b>207</b>

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY IS NOT RESPONSIBLE FOR CHARGES INCURRED DUE TO COMPLETION OF THIS FORM. THE PATIENT IS RESPONSIBLE FOR ANY CHARGES ASSOCIATED WITH FORM COMPLETION.